FILED BY CLERK
JAN 15 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. HENRY BARAJAS, Petitioner.	2 CA-CR 2008-0215-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054248

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Higgins and Higgins, P.C.
By Harold L. Higgins, Jr.
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Henry Barajas was convicted of aggravated assault with a deadly weapon, aggravated robbery, armed robbery, and possession of a firearm by a prohibited possessor. He appealed, and this court affirmed the convictions and the sentences imposed.

State v. Barajas, No. 2 CA-CR 2006-0193 (memorandum decision filed May 14, 2007). In a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., he argued he was entitled to relief from his convictions based on the supreme court's decision in *State v. Gant*, 216 Ariz 1, 162 P.3d 640 (2007), *cert. granted*, ___ U.S. ____, 128 S. Ct. 1443 (2008), which he characterized as a significant change in the law as contemplated by Rule 32.1(g). He also asserted his trial counsel had been ineffective. The trial court denied relief. In his petition for review, Barajas contends the trial court erred when it found *Gant* inapplicable to his case. We will not disturb the trial court's ruling absent a clear abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶2 The facts presented at trial are set forth in this court's memorandum decision on appeal. *See Barajas*, No. 2 CA-CR 2006-0193, ¶¶ 2-6. Briefly, police stopped the car in which Barajas had been riding as a passenger in the back seat because it fit the description of a car connected with an armed robbery. The driver stopped, and the driver and the front-seat passenger fled on foot. Barajas was arrested and identified by witnesses as the perpetrator of the robbery. As we stated in our memorandum decision, "Barajas, seated behind the front passenger seat, was detained, and a pat-down search revealed $142 in his 'front right pocket.' Visibly protruding from under the seat in front of where Barajas had been sitting was a nine-millimeter handgun." *Id*. ¶ 5. We also noted the car appeared to belong to the driver, who was not apprehended. *Id*. n.2.

¶3 Barajas asserted in his Rule 32 petition that, based on *Gant*, the car should not have been searched, the gun would not have been found and seized, and the state would not have had a key piece of evidence to support the charges against him. Barajas insisted *Gant*

applies to his case. In his reply to the state's response to the petition for post-conviction relief, Barajas asserted that trial counsel had been ineffective for failing to challenge the search of the car.

¶4 The trial court conducted a retroactivity analysis pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). But such an analysis was not necessary because Barajas's conviction was not final when the supreme court decided *Gant*; we issued our mandate in Barajas's appeal on August 13, 2007, and the supreme court decided *Gant* on July 25, 2007. *See State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (finding conviction is final when "'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied'"), *quoting Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Thus, *Gant* does "apply to [Barajas's] case." Ariz. R. Crim. P. 32.1(g).

¶5 Nevertheless, the trial court did not abuse its discretion by denying Barajas's petition for post-conviction relief. Because he did not file a motion to suppress the evidence, Barajas cannot assert that *Gant* was "a significant change in the law that . . . would probably overturn [his] conviction." Ariz. R. Crim. P. 32.1(g). And, although he asserted in his reply to the state's opposition below that trial counsel had been ineffective for not filing such a motion, he does not challenge on review the trial court's denial of relief on that ground.[1]

[1]Given the state of the law at the time, trial counsel could not have performed deficiently by not moving to suppress the evidence seized from the car. *See State v. Febles*, 210 Ariz. 589, ¶ 24, 115 P.3d 629, 637 (App. 2005) (rejecting claim that counsel had performed deficiently on appeal for failing to raise issue given state of law at time of appeal; "[c]ounsel's failure to predict future changes in the law . . . is not ineffective ").

¶6 Moreover, a defendant who fails to state a colorable claim for relief is not entitled to an evidentiary hearing. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). A colorable claim is one that, "if defendant's allegations are true, might have changed the outcome." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). Here, Barajas has not established a colorable claim that a motion to suppress the evidence was even warranted given the differences between the factual and legal circumstances in *Gant* and this case. Indeed, the record before us and the facts as stated in our memorandum decision suggest constitutional bases for seizing the gun and searching the vehicle independent of any search incident to Barajas's arrest.[2]

¶7 Although the petition for review is granted, we deny relief.

_____
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
J. WILLIAM BRAMMER, JR., Judge

_____
GARYE L. VÁSQUEZ, Judge

[2]The weapon Barajas now seeks to suppress under the reasoning set forth in *Gant* was visible in plain view, and the record supports a conclusion that the officers possessed probable cause to search the vehicle: the vehicle's description matched that of the perpetrators' getaway car and, once stopped, the driver and one passenger of the vehicle fled on foot.